Legal Brief

What is the standard of care for a veterinarian, and does departure from it always spell liability?

This subject of standard of care has been addressed several times in earlier Legal Briefs, but a 1999 California Appellate Court decision compels the writer to address this subject further. Before looking at the case in some detail, a brief review of court opinions about the standard for veterinarians is in order. In early veterinary medical malpractice cases before the advent of ready means of communication and the growth of veterinary medical continuing education programs, courts would judge the action of a veterinarian in a particular procedure by what veterinarians in his or her community or locality would have done. This was known as the locality rule and was generally established through expert testimony. However, even in earlier days, there was a theory applicable in human and veterinary medicine under which a physician or veterinarian might be sued successfully for malpractice without the use of expert testimony. If the negligent act spoke for itself, so that a layman could understand that it was wrong, expert testimony was not needed. Feeling the need of applying some scientific sounding language, this came to be the res ipsa loquitur theory. For example, if a dog fell from the operating table and was injured, it didn't take expert testimony to show that this was not standard practice, even in a small locality. As improved means of communication grew and veterinarians were able to learn about methods being used by veterinarians nationwide, a more general standard of care and treatment evolved and employment of the locality rule declined.

Harking back now to the 1999 California Appellate Court case, *Williamson v Prida* (89 Cal Reporter 2nd, 868), we learn that in California at least, the standard of care and treatment may not only be a general one but may be the same as that which has evolved for the human medical profession. In reaching this conclusion, the courts cited an earlier California case, *Huffman v Lindquist* (31 Cal 2d 465, 234 P2d 34), in which the court said in somewhat contorted language, "In medical malpractice cases, the established rule is that a doctor must exercise the degree of skill or care usual in the profession and will not be held liable for untoward consequences in the absence of a want of such reasonable care and skill." In this case, the veterinarian was sued because he had injected oxytetracycline into the jugular vein of a horse, following which the horse developed a thrombosis. The trial court's judgment for the plaintiff was reversed. The appeals court, applying a standard of skill and care it had established, said,

> Proof of lack of proper care and skill in a given treatment or failure to treat in a certain way is not sufficient to establish a case of malpractice on the part of a physician. The law does not require that the advice, instructions and treatment given by a physician to a patient shall be at all events proper or that this treatment could be such as to attain an approximate perfect result.

The facts were unclear as to just where the injection had been given, and the court heeded the testimony of an expert that thrombosis is a risk of any oxytetracycline injection, even if given correctly, and that proof of thrombosis is not proof that the drug was administered negligently.

In a sense, this case simply emphasizes 3 defenses that have always been available when a veterinarian is sued for malpractice. The first defense is a challenge of the facts—the plaintiff must establish that the act complained of actually occurred. Second, the plaintiff must show that this act, as performed by the veterinarian, was a departure from a standard of care acceptable to the court, and third, it must be shown that even if there was a departure from the standard of care, that this departure was the cause of the damage or death of the animal. Thus, the proximate cause defense should never be overlooked, and that proof that what the veterinarian did was the actual cause of the injury or death of the animal. The California case also intimates that there might be another defense, although this writer considers that a weak one—namely, that the injury or death could have occurred even if there was no departure from the standard of skill and care in administering the injection or performing any other procedure that must be measured against the way other veterinarians would have performed it.

Another consideration should not be overlooked in applying a standard of skill and care. This is the unavailability of a product or device that would be required for meeting the standard and a decision on the part of a veterinarian to be innovative and try something he or she has reason to believe might be effective. Extralabel use of drugs is an example, but in a lifetime of practice, a veterinarian, especially one who keeps up with developments in veterinary medicine, is likely to wonder from time to time why a different procedure or a different product might be better than those generally approved and hence take the risk of trying them. That is one of the ways new and better treatment of animals is discovered.

Prepared by Harold W. Hannah, JD, Texico, IL 62889, formerly Professor of Agricultural and Veterinary Medical Law, University of Illinois, Urbana.